

RESTITUTION REMEDIES IN CONTRACT CASES: FINDING A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP TO GAIN REMEDIES

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INTRODUCTION

The American lawyer has given relatively little attention to possible remedies of a restitutionary nature as alternatives for the more well-known and understood remedies of damages and specific performance in contract cases. When he did venture into the area of restitution, he usually limited his exploration to quasi-contract for he has been traditionally more at ease there.¹ This was probably due to the successful missionary work of William A. Keener's treatise.² Professor Keener's work was not so successful that additional understanding is no longer needed with regard to quasi-contracts, however.³ Still less understood has been the modern use of the remedies of constructive trust and equitable lien to give specific restitution effects rather than money restitution. It is submitted that the imaginative use of these remedies can assist the lawyer in developing extraordinarily effective techniques for the recovery of specific property or for the security of an interest in a performance already completed. This should be especially true where a confidential or fiduciary relationship between the parties to a contract can be found. Through the constructive trust and the equitable lien it is possible that tracing principles may also be made available as they have been in other contexts where these remedies were used.⁴

THE RIGHT TO RESTITUTION

The substantive right to restitution is based upon the prevention of unjust enrichment.⁵ It seems clear that unjust enrichment should include not only those cases where the defendant receives a benefit which he should not retain but also those cases where the plaintiff suffers an unjust detriment without a corresponding benefit in the defendant. *Moses v. Macferlan*⁶ first delineated the basic principle of restitution in

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¹ In his lectures on jurisprudence in 1832, John Austin established contracts, quasi-contracts and delicts as the rights *in personam*. 1 AUSTIN, JURISPRUDENCE 55 (4th ed. 1873).

² KEENER, A TREATISE ON THE LAW OF QUASI CONTRACTS (1893).

³ Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 224 (1936).

⁴ 4 SCOTT, TRUSTS §§ 462-63 (2d ed. 1956).

⁵ Seavey and Scott, *Restitution*, 54 LAW Q. REV. 29, 32 (1938); Thurston, *Recent Developments in Restitution: 1940-47*, 45 MICH. L. REV. 935, 936 (1947).

⁶ 2 Burr. 1005 (1760).

our common law jurisdictions. Lord Mansfield indicated that under the circumstances of the case before him, the defendant was obliged by the ties of natural justice and equity to refund the money. The principles by which a person secures a right to restitution are the same whether he seeks to use legal or equitable remedies. While it is essential first to establish a *right* to restitution before one can use the equitable remedies of constructive trust or equitable lien to perfect that right, not all rights to restitution give rise to such equitable remedies.⁷ In many circumstances, for example, equitable remedies are denied because an adequate remedy at law exists,⁸ yet equitable remedies may be available where legal ones are not because of the limitations which law courts may have imposed upon themselves. It also is clear that legal remedies may be pursued in cases where equitable remedies are available. For example, an action for the money value of specific property may be pursued although an alternative remedy of constructive trust or equitable lien could have been exercised by the plaintiff. The disregarding of these equitable remedies may not always be wise, for the lawyer may find greater advantages in pursuing them on behalf of his client than in being content to secure a judgment for money only.

Tracing as a result of establishing an equitable lien or to perfect the constructive trust has already been mentioned⁹ as a possible advantage. A money judgment lien must be perfected and is effective only when this has occurred. The equitable lien or constructive trust will operate from the time the equity arose in many jurisdictions and can only be cut off generally by one who is a third party bona fide purchaser. The actual securing of the specific property is an obvious advantage in constructive trust and an equitable lien assists in forcing the sale of specific property. The successful beneficiary of a constructive trust or a lien holder is protected where insolvency of the defendant is involved. Liens and trusts imposed by law also remove property from exemption claims by debtors.¹⁰

The right to restitution from a party who has wholly failed to perform his part of a contract is firmly established in our law.¹¹ American courts have even gone so far as to say that there is a right of restitution from a defendant who has partially performed where the defendant has committed a substantial breach or repudiated his agree-

⁷ RESTATEMENT, RESTITUTION 4 (1937).

⁸ Comment, *Must the Remedy at Law Be Inadequate Before a Constructive Trust Will Be Impressed?*, 25 ST. JOHN'S L. REV. 283 (1951).

⁹ 4 SCOTT, *op. cit. supra* note 4.

¹⁰ See Note, 56 DICK. L. REV. 235, 243 (1952).

¹¹ *Ginther v. Shultz*, 40 Ohio St. 104 (1883). See RESTATEMENT, CONTRACTS §§ 274, 313, 347, 354 (1932).

ment so long as the parties can be restored to the *status quo ante*.¹² The breach must be a substantial one to give rise to a right of restitution.¹³ Otherwise, the plaintiff is restricted to an action to secure damages for the breach of contract.¹⁴

Mr. Williston refers to this right as "right of rescission and restitution,"¹⁵ while Mr. Corbin is opposed to the use of such a term.¹⁶ He also indicates that this is not a quasi-contract right, but a right which gives rise to one of two or more alternative remedies given to the plaintiff as a result of the breach of contract by the defendant.¹⁷ In most cases, it is an alternative right to prevent unjust enrichment.¹⁸

Since the right of restitution arises to prevent injustice we must look for cumulative evidence which demonstrates that an unjust loss by the plaintiff or unjust gain by the defendant has occurred. Single facts, such as an unjustifiable, willful, material breach by the defendant after a performance by the plaintiff of his duties under a contract may be the capstone which causes the right to arise. It does not follow that all rights to restitution have equitable remedies available to vindicate those rights.

The evidence creating the right of restitution may well be of such a nature that an equitable remedy would be available. Such evidence, if it could be marshalled, would make available the remedy of constructive trust or the remedy of equitable lien to assist in specific restitution for a plaintiff.

The terms "fiduciary relationship" and "confidential relationship" are found in several fields of law. They are almost always dealt with in actions of an equitable nature. These terms appear to have been deliberately left vague by the courts in order that categories, complete and perfect, would not give the unscrupulous person the opportunity to

¹² "The principle of law recognized by these cases is this: That the courts will not encourage the violation of agreements by relieving the defaulting party from the intentional and unjustifiable breach of his agreement and allowing him to recover *pro tanto* for the part performance of a contract that is entire; where the other contracting party is not at fault and has not waived a full performance by acceptance or otherwise." *Goldsmith v. Hand*, 26 Ohio St. 101, 106 (1875).

¹³ *Higby v. Whittaker*, 8 Ohio 198 (1837).

¹⁴ *Village of Wells v. Layne-Minnesota Co.*, 240 Minn. 132, 60 N.W.2d 621 (1953); *City of Cleveland v. Herron*, 102 Ohio St. 218, 131 N.E. 489 (1921).

¹⁵ 5 WILLISTON, CONTRACTS § 1454A (2d ed. 1937).

¹⁶ 5 CORBIN, CONTRACTS § 1105 (1951).

¹⁷ "This is no more and no less than can be said for the remedy in damages. When the law gives a judgment for damages for breach of contract it is no more enforcing the contract of the parties than it is doing when a judgment for restitution is entered. The contracting parties have no more expressed their assent to pay damages in case of a breach, except perhaps in cases where damages have been 'liquidated,' than they have to the payment of restitution in the case of a breach." 5 CORBIN, CONTRACTS § 1106 (1951).

¹⁸ 5 WILLISTON, CONTRACTS § 1454 (2d ed. 1937).

operate just inside the law.¹⁹ There are, of course, certain relationships which are clearly fiduciary in nature: executor and beneficiaries, guardian and ward, attorney and client, trustee and beneficiary, partners, joint adventurers, officers and directors of a corporation and the corporation, agent and principal, trustee in bankruptcy, spiritual advisor and devotee, doctor and patient, to name some but not all.²⁰ In all of these instances there is a well-established category of law which defines the duties arising out of the relationships which, by their innate character as institutions of the law, cause the duties to arise. Confidential relationship includes "that large miscellaneous list of cases where actual trust and confidence of a high type creates a corresponding duty, but where no tag or label can be given to the relationship except the broad term of confidential relationship."²¹ This kind of relationship places emphasis upon the attitude of the parties rather than upon the innate nature of the relationship as in the fiduciary examples. Once a relationship has been declared fiduciary or confidential, whether these arise from a moral, social, domestic or personal relation, it is possible the equitable remedies may be used, for the confidential relationship alone is evidence sufficient to cause the courts to vindicate it.²²

Numerous attempts have been made in the past to find confidential relationships between parties in ordinary business relations, but the courts have generally denied that a fiduciary or confidential relationship existed without more evidence of the comparative strength of the parties' positions.²³ However, there are a considerable number of cases which indicate that such confidential relationships may arise from a business context where other evidence is present beyond the mere existence of the business association.²⁴

¹⁹ 1 STORY, EQUITY JURISPRUDENCE 200 (13th ed. 1886).

²⁰ See VINTER, FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS (3d ed. 1955).

²¹ Bogert, *Confidential Relations and Unenforceable Express Trusts*, 13 CORN. L.Q. 237, 248 (1928).

²² Dietz v. Dietz, 244 Minn. 330, 70 N.W.2d 281 (1955); POMEROY, EQUITY JURISPRUDENCE § 1045 (4th ed. 1918); RESTATEMENT, RESTITUTION § 190 (1937); Cardozo stated, "Unjust enrichment under cover of a relation of confidence puts the Court in motion," in Sinclair v. Purdy, 235 N.Y. 245, 253, 139 N.E. 255, 258 (1922).

²³ Eckert v. Miller, 57 Ariz. 94, 111 P.2d 60 (1941); Abeleia v. Pepper, 8 Cal. 2d 25, 63 P.2d 817 (1936); Santa Anita Corp. v. Walker, 106 Colo. 465, 106 P.2d 459 (1940); People *ex rel.* Nelson v. Central Mfg. Dist. Bank, 306 Ill. App. 15, 28 N.E.2d 154 (1940); Cranwell v. Oglesby, 299 Mass. 148, 12 N.E.2d 81 (1937); *In re Morrish's Estate*, 156 Pa. Super. 394, 40 A.2d 907 (1945).

²⁴ Lawson v. Haynes, 170 F.2d 741 (10th Cir. 1948), 18 U. CIN. L. REV. 230 (1949); Anglo-Calif. Nat'l. Bank v. Philpot, 148 Cal. App. 2d 469, 306 P.2d 970 (1957); Carter v. Abramo, 201 Md. 339, 93 A.2d 546 (1953); Warsofsky v. Sherman, 326 Mass. 290, 93 N.E.2d 612 (1950); Errico v. Scopollitti, 131 N.J. Eq. 125, 24 A.2d 384 (1942).

Principles have been stated by the courts to define the confidential relationship.²⁵ None of these statements has been able to encompass its evolution. We find, therefore, that the confidential relationship arises from the cumulative effect of evidence. Factors that have been meaningful are those which deal with dependency, mental condition, residence, age, domination, physical condition, education, business experience, length of dealing, joint ownership, friendship, blood or family relationships, passage of time and control over affairs. No factor by itself controls the finding of law or fact that there is a fiduciary or confidential relationship.

It has been suggested that an extremely important factor which does not appear in the reported opinions is demeanor evidence which could play a decisive role where there is little other evidence upon which to rely in determining whether a confidential relationship exists.²⁶

THE REMEDIES

In considering the constructive trust as primarily a remedy only where fraud,²⁷ mistake,²⁸ undue influence²⁹ and duress³⁰ can be proved to establish the restitution right, we are neglecting the area of simple breach of contract. Indeed, there is some evidence that we even neglect its use in the other areas as well.³¹ A constructive trust has been termed "the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."³² "A constructive trust is

²⁵ See *Stepp v. Frampton*, 179 Pa. 284, 289, 36 Atl. 177, 179 (1897), which quotes BEACH, *MODERN EQUITY JURISPRUDENCE* • § 125 (1873): "But when the relations existing between the contracting parties appear to be of such a character as to render it certain that they do not deal on 'equal terms, but that on the one side . . . from overmastering influence, or on the other side, from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, then the burden is shifted and the transaction is presumed void. . . . This principle is of very general application, and the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise."

²⁶ Note, 97 U. PA. L. REV. 712, 724 (1949).

²⁷ *Harper v. Adametz*, 142 Conn. 218, 113 A.2d 136, 35 B.U.L. REV. 604 (1955).

²⁸ *O'Brien v. Elder*, 250 F.2d 275 (5th Cir. 1957).

²⁹ *Batchelor v. Mitchell*, 238 N.C. 351, 78 S.E.2d 240 (1953).

³⁰ *Glojek v. Glojek*, 254 Wis. 109, 35 N.W.2d 203 (1948).

³¹ Vanneman, *The Constructive Trust: A Neglected Remedy in Ohio*, 10 U. CINC. L. REV. 366 (1936).

³² *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 382 (1919). See *Newton v. Taylor*, 32 Ohio St. 399 (1877).

then the remedial device through which preference of self is made subordinate to loyalty to others."³³

These definitions make this remedy one which clearly asserts the right of restitution which could arise from a fiduciary or confidential connection between parties to a contract which has been broken in order to secure specific restitution of property.³⁴ Some opinions seem to require the presence of fraud,³⁵ but these really mean only constructive fraud such as that arising when a confidential relationship is ignored or undue influence used.³⁶

It has been suggested that the remedy of equitable lien is really an "offshoot" of constructive trust. It is the end result of tracing in its most frequent modern application.³⁷ The *Restatement*,³⁸ however, limits the equitable lien to the function of reaching specific property and holding it as security to prevent unjust enrichment.³⁹ This seems to be in accord with the cases. The equitable lien remedy is more easily granted than that of constructive trust in the absence of any additional facts such as fraud, the fiduciary or confidential relationship, duress, undue influence or mistake. Aside from the support cases⁴⁰ or specific statutory authorization⁴¹ the courts have been reluctant to allow specific restitution to the grantor of land for breach of an agreement by the

³³ *Meinhard v. Salmon*, 249 N.Y. 458, 467, 164 N.E. 545, 551 (1928). See dissent of Williams, J., in *Olaff v. Hodapp*, 129 Ohio St. 432, 444, 195 N.E. 838, 843 (1935); *RESTATEMENT, RESTITUTION* § 160 (1937).

³⁴ Dean Roscoe Pound has stated: "A group of cases involving constructive trusts invites consideration of what such a trust really is. An express trust is a substantive institution. Constructive trust on the other hand is purely a remedial institution. As the chancellor acted *in personam*, one of the most effective remedial expedients at his command was to treat a defendant as if he were a trustee and put pressure upon his person to compel him to act accordingly. Thus constructive trust could be used in a variety of situations, sometimes to provide a remedy better suited to the circumstances of the particular case, where the suit was founded on another theory, as in the cases of reformation, of specific performance, of fraudulent conveyance and of what the civilian would call the exclusion of unworthy heirs, and sometimes to develop a new field of equitable interposition, as in what we have come to think the typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment." Pound, *The Progress of the Law, Equity*, 33 HARV. L. REV. 420, 421 (1920).

³⁵ *Taft v. Guardian Trust Co.*, 32 Ohio N.P. (n.s.) 345, 17 Ohio L. Abs. 54 (1934).

³⁶ Costigan, *The Classification of Trusts*, 27 HARV. L. REV. 437-39 (1914).

³⁷ DAWSON, *UNJUST ENRICHMENT* 34 (1951).

³⁸ *RESTATEMENT, RESTITUTION* § 161 (1937).

³⁹ *In re Waterson*, Berlin & Snyder Co., 48 F.2d 704 (2d Cir. 1931); *Klaustermeyer v. Cleveland Trust Co.*, 89 Ohio St. 142, 105 N.E. 278 (1913).

⁴⁰ *Lowman v. Lowman*, 105 Ind. App. 102, 12 N.E.2d 961 (1938); *Beard v. Beard*, 200 Ky. 4, 254 S.W. 430 (1923); *Enslein v. Enslein*, 84 Ohio App. 259, 82 N.E.2d 555 (1948).

⁴¹ *Petty v. Hall*, 257 Ala. 145, 57 So. 2d 620 (1952).

grantee.⁴² Specific restitution is given in such cases⁴³ and the insolvency of the defendant will make it even more likely that the remedy of constructive trust will be decreed.⁴⁴ Certain classifications of contract cases in which constructive trust would be granted have been suggested,⁴⁵ but this appears to defeat the purpose of having such remedies in our law. The scope of the equitable remedies has been able to develop in part due to the lack of classification. It is true that additional classifications do arise, but no road block has stopped them. When the interests of third parties, who are purchasers or creditors, are in conflict with interests protected by the remedies of constructive trust or equitable lien, these can be weighed against each other. Lawyers will always try to formulate rules by formulating all common denominators found in a variety of situations into patterns.

John Dawson has stated the problem in this manner:

The danger we face when this stage is reached comes from human beings themselves. One of the traits which distinguish human beings from the elephants and great cats is their possession of an ethical faculty, including a sense of justice. This faculty will probably never be fully understood, though we find that it exists. It ensures that the disapproval of enrichment through another's loss, once formulated as motive in particular cases, will tend to become an imperative. A useful and necessary principle becomes something more than a 'general guide. In some of its aspects it is a rule. It seems so simple and so clearly just. Why should we not extend it?'⁴⁶

CONCLUSION

Once a right to restitution has been established to insure against unjust enrichment in cases of a defendant's default on a contract through substantial breach after performance, we should look to equitable restitutionary remedies as well as the legal restitutionary remedies. Although the equitable remedies of constructive trust and equitable lien are granted in simple breach of contract cases in limited areas to give specific restitution of property or to secure an interest in specific property, this is done reluctantly by the courts. It is suggested that a confidential or fiduciary relationship can arise from a cumulation of factual evidence and assist not only in establishing the right of restitution but also in

⁴² See *Haydon v. St. Louis & S.F. Ry.*, 222 Mo. 126, 121 S.W. 15 (1909); *Chicago, T. & M.C. Ry. v. Titterton*, 84 Tex. 218, 19 S.W. 472 (1892).

⁴³ *Piper v. Queeney*, 282 Pa. 135, 127 Atl. 474 (1925).

⁴⁴ *Fletcher v. Fletcher*, 158 Ga. 899, 124 S.E. 722 (1924).

⁴⁵ NEWMAN, TRUSTS 243 (1955).

⁴⁶ DAWSON, UNJUST ENRICHMENT 151 (1951).

making more available the equitable remedies which arise to protect the party who suffers loss as a result of the breach of duty imposed by such a relationship. This would be further reinforced where a defendant is insolvent.

We should not attempt to overformulate the rights or remedies of restitution. We should be mindful of the interests of others which may be diminished by permitting such rights and remedies. Above all, however, we must have an open end to these principles to make possible the continued understanding of our own ethical faculties as human beings.